

**STATE OF TEXAS
DEPARTMENT OF INFORMATION RESOURCES**

CONTRACT FOR SERVICES

SUNGARD AVAILABILITY SERVICES, LP

1. Introduction

A. Parties

This Contract for services is entered into between the State of Texas, acting by and through the Department of Information Resources (hereinafter “DIR”) with its principal place of business at 300 West 15th Street, Suite 1300, Austin, Texas 78701, and Sungard Availability Services, LP (hereinafter “Vendor”), with its principal place of business at 680 East Swedesford Road, Wayne, PA 19087.

B. Compliance with Procurement Laws

This Contract is the result of compliance with applicable procurement laws of the State of Texas. DIR issued a solicitation on the Comptroller of Public Accounts’ Electronic State Business Daily, Request for Offer (RFO) DIR-SDD-TMP-199, on October 30, 2012, for Cloud Services. Upon execution of this Contract, a notice of award for RFO DIR-SDD-TMP-199 shall be posted by DIR on the Electronic State Business Daily.

C. Order of Precedence

This Contract; Appendix A, Standard Terms and Conditions For Services Contracts; Appendix B, Vendor’s Historically Underutilized Businesses Subcontracting Plan; Appendix C, Pricing Index; Appendix D, Sample Statement of Work; Appendix E, Cloud Services Content; Appendix F, Advanced Recovery Services Content; Exhibit 1, Vendor’s Response to RFO DIR-SDD-TMP-199, including all addenda; and Exhibit 2, RFO DIR-SDD-TMP-199, including all addenda; are incorporated by reference and constitute the entire agreement between DIR and Vendor. In the event of a conflict between the documents listed in this paragraph, the controlling document shall be this Contract, then Appendix A, then Appendix B, then Appendix C, then Appendix D, then Appendix E, then Appendix F, then Exhibit 1, and finally Exhibit 2. In the event and to the extent any provisions contained in multiple documents address the same or substantially the same subject matter but do not actually conflict, the more recent provisions shall be deemed to have superseded earlier provisions. The Services selected by Customer (as defined in Appendix A) shall be set forth on a Schedule(s) which will designate the type of services it covers by reference to one of the Services Exhibits (each a “Schedule”). Each Schedule entered into hereunder represents a separate contract between Vendor and Customer. The Schedule(s) cannot contradict or void Contract requirements.

2. Term of Contract

The term of this Contract shall be one (1) year commencing on the last date of approval by DIR and Vendor. Prior to expiration of the original term, DIR and Vendor may extend this Contract, upon mutual agreement, for up to three (3) optional one-year terms. Protracted contract negotiations may, in DIR's sole discretion, result in fewer optional terms.

3. Service Offerings

Services available under this Contract are limited to those specified in Appendix C, Pricing Index. Vendor may incorporate changes to their services offering; however, any changes must be within the scope of services awarded based on the posting described in Section 1.B above. Vendor may not add services which were not included in the Vendor's response to the solicitation described in Section 1.B above.

4. Pricing**A. Manufacturer's Suggested Retail Price (MSRP)**

MSRP is defined as the sales price suggested by the manufacturer or publisher of the service.

B. Customer Discount

The minimum Customer discount for all services will be the percentage off MSRP as specified in Appendix C, Pricing Index. Customer Discount includes the DIR administrative Fee specified in Section 5.

C. Customer Price

1) The price to the Customer shall be calculated as follows:

$$\text{Customer Price} = \text{MSRP} - \text{Customer Discount}$$

2) Customers purchasing services under this Contract may negotiate more advantageous pricing or participate in special promotional offers. In such event, a copy of such better offerings shall be furnished to DIR upon request.

3) If pricing for products or services available under this Contract are provided at a lower price to: (i) an eligible Customer who is not purchasing those products or services under this Contract or (ii) any other entity or consortia authorized by Texas law to sell said products and services to eligible Customers, then the available Customer Price in this Contract shall be adjusted to that lower price. This requirement applies to products or services quoted by Vendor for a quantity of one (1) under like terms and conditions, and does not apply to volume or special pricing purchases. This Contract shall be amended within ten (10) business days to reflect the lower price.

D. DIR Administrative Fee

The administrative fee specified in Section 5 below shall not be broken out as a separate line item when pricing or invoice is provided to Customer.

E. Tax-Exempt

As per Section 151.309, Texas Tax Code, Customers under this Contract are exempt from the assessment of State sales, use and excise taxes. Further, Customers under this Contract are exempt from Federal Excise Taxes, 26 United States Code Sections 4253(i) and (j).

F. Travel Expense Reimbursement

Pricing for services provided under this Contract are exclusive of any travel expenses that may be incurred in the performance of those services. Travel expense reimbursement may include personal vehicle mileage or commercial coach transportation, hotel accommodations, parking and meals; provided, however, the amount of reimbursement by Customers shall not exceed the amounts authorized for state employees as adopted by each Customer; and provided, further, that all reimbursement rates shall not exceed the maximum rates established for state employees under the current State Travel Management Program (<http://www.window.state.tx.us/procurement/prog/stmp/>). Travel time may not be included as part of the amounts payable by Customer for any services rendered under this Contract. The DIR administrative fee specified in Section 5 below is not applicable to travel expense reimbursement. Anticipated travel expenses must be pre-approved in writing by Customer.

G. Changes to Prices

Vendor may change the price of any service at any time, based upon changes to the MSRP, but discount levels shall remain consistent with the discount levels specified in this Contract. Price decreases shall take effect automatically during the term of this Contract and shall be passed onto the Customer immediately.

5. DIR Administrative Fee

A) The administrative fee to be paid by the Vendor to DIR based on the dollar value of all sales to Customers pursuant to this Contract is three-fourths of one percent (.75%). Payment will be calculated for all sales, net of returns and credits. For example, the administrative fee for sales totaling \$100,000 shall be \$750.00.

B) All prices quoted to Customers shall include the administrative fee. DIR reserves the right to change this fee upwards or downwards during the term of this Contract, upon written notice to Vendor without further requirement for a formal contract amendment. Any change in the administrative fee shall be incorporated in the price to the Customer.

6. Notification

All notices under this Contract shall be sent to a party at the respective address indicated below.

If sent to the State:

Grace Windbigler
Enterprise Contract Management
Department of Information Resources
300 W. 15th St., Suite 1300
Austin, Texas 78701
Phone: (512) 475-4700
Facsimile: (512) 475-4759

If sent to the Vendor:

Contract Administration - Legal
Sungard Availability Services, LP
East Swedesford Road
Wayne, PA 19087
Phone: (484) 582-2000
Facsimile: (610) 225-1125
Email: contract.admin@sungardas.com

7. Statement of Work, Service Agreement and Shrink/Click-wrap Agreements

A. Statement of Work and Service Agreements

Services provided under this Contract shall be based on the Sample Statement of Work as set forth in Appendix D of this Contract and the Service Agreement as set forth in Appendix E and F of this Contract. Customers may negotiate the terms and conditions of a SOW and Service Agreement to suit their business needs, so long as the negotiated terms and conditions do not diminish Vendor's commitments set forth in the Appendix D, Sample Statement of Work, Appendices E and F, Service Agreements, or this Contract.

B. Shrink/Click-wrap Agreement

Regardless of any other provision or other license or service terms which may be issued by Vendor after the effective date of this Contract, and irrespective of whether any such provisions have been proposed prior to or after the issuance of a Purchase Order for products licensed under this Contract, or the fact that such other agreement may be affixed to or accompany software upon delivery (shrink-wrap), the terms and conditions set forth in this Contract shall supersede and govern the terms between Customers and Vendor. **It is the Customer's responsibility to read the Shrink/Click-wrap License/Service Agreement and determine if the Customer accepts the license terms as amended by this Contract. If the Customer does not agree with the license/service terms, Customer shall be responsible for negotiating with the Vendor to obtain additional changes in the Shrink/Click-wrap Agreement language.**

8. Intellectual Property Matters

At present, no development of new code or other customization related to Intellectual Property is contemplated under this Contract. At such time as Vendor and Customer agree to a scope of work involving new code development, the parties agree to negotiate applicable Intellectual Property provisions.

9. Authorized Exceptions to Appendix A, Standard Terms and Conditions for Services Contracts.

A. **Section 2. Definitions, H. Acceptable Use Policy**, is hereby added:

“Acceptable Use Policy” (AUP), found at <http://www.sungardas.com>, means the policy governing transmissions through, and use of, the network over which the Services are provided.

B. **Section 5. Contract Fulfillment and Promotion, D. DIR Logo**, is hereby replaced in its entirety:

Vendor may use the DIR logo in the promotion of the Contract to Customers with the following stipulations: (i) the logo may not be modified in any way, (ii) when displayed, the size of the DIR logo must be equal to or smaller than the Vendor logo, (iii) the DIR logo is only used to communicate the availability of services under the Contract to Customers, and (iv) any other use of the DIR logo requires prior written permission from DIR. DIR will not use Vendor’s logo without Vendor’s prior written consent.

C. **Section 5. Contract Fulfillment and Promotion, H. DIR Cost Avoidance**, is hereby replaced in its entirety:

As part of the performance measures reported to state leadership, DIR must provide the cost avoidance the State has achieved through the Contract. Upon request by DIR, Vendor shall provide DIR with a detailed report of a representative sample of service sold under the Contract. The report shall contain: service description, list price and price to Customer under the Contract.

D. **Section 8. Vendor Responsibilities, A. Indemnification. 4. Property Damage**, is hereby replaced in its entirety:

IN THE EVENT OF LOSS, DAMAGE, OR DESTRUCTION OF ANY PROPERTY OF CUSTOMER OR THE STATE DUE TO THE NEGLIGENCE, WILLFULL MISCONDUCT, WRONGFUL ACT OR OMISSION ON THE PART OF THE VENDOR, ITS EMPLOYEES, AGENTS, REPRESENTATIVES, OR SUBCONTRACTORS, THE VENDOR SHALL PAY THE FULL COST OF EITHER REPAIR, RECONSTRUCTION, OR REPLACEMENT OF THE PROPERTY, AT

THE CUSTOMER'S SOLE ELECTION. SUCH COST SHALL BE DETERMINED BY THE CUSTOMER AND SHALL BE DUE AND PAYABLE BY THE VENDOR NINETY (90) CALENDAR DAYS AFTER THE DATE OF THE VENDORS RECEIPT FROM THE CUSTOMER OF A WRITTEN NOTICE OF THE AMOUNT DUE.

- E. **Section 8. Vendor Responsibilities, H. Confidentiality**, is hereby replaced in its entirety:

To the extent authorized by the Texas Public Information Act and other applicable laws, each party will hold the other party's Confidential Information in confidence and will take all reasonable security measures to protect the other's Confidential Information against unauthorized disclosure. All Confidential Information transmitted, or made available by Customer to Vendor which contains personal information or other sensitive Customer data will be encrypted by Customer so that it is unintelligible before Customer transmits, or makes available, such Confidential Information to Vendor.

Each party will give the other prompt written notice if it learns of any unauthorized use, disclosure, theft, or other loss of the other's Confidential Information; or, to the extent legally permitted, if disclosure of the other's Confidential Information is being sought by legal process.

Customer agrees that as the data controller, it is entitled to transfer its Confidential Information, including relevant personal data to Vendor, the data processor, so that it, its Affiliates and third party contractors may process the Confidential Information for purposes of providing the Services under the Contract.

Customer shall be responsible for maintaining secure and complete back-up of its data, except with respect to any Services provided by Vendor that specifically include data back-up.

- F. **Section 8. Vendor Responsibilities, K. Limitation of Liability**, is hereby replaced in its entirety:

For any claim or cause of action arising under or related to the Contract: i) to the extent permitted by the Constitution and the laws of the State of Texas, except for the exclusions set forth below, none of the parties shall be liable to the other for punitive, special, or consequential damages, even if it is advised of the possibility of such damages; and ii) Vendor's liability for damages of any kind to the Customer shall be limited to the total amount paid to Vendor under the Contract during the twelve months immediately preceding the accrual of the claim or cause of action.

The limitations of liability in Section K will not apply to damages claims for:

(a) Vendors' infringement indemnity obligations set forth in Section 8A3, in which case the aggregate direct or consequential liability for all such claims under a Schedule will be unlimited;

(b) Breach of Vendor's obligations concerning security or confidentiality, in which case the aggregate direct or consequential liability for all such claims under a Schedule shall be limited to the lesser of: (A) thirty-six times the average monthly amount paid to Vendor under the Contract during the twelve months immediately preceding the accrual of the claim or cause of action; or (B) \$20,000,000. CUSTOMERS SHOULD EVALUATE THEIR RISK FOR EACH PURCHASE; IF NEEDED, CUSTOMERS MAY NEGOTIATE HIGHER LIMITATIONS OF LIABILITY;

(c) Breach of Intellectual Property, in which case the aggregate direct or consequential liability for all such claims under a Schedule will be unlimited;

(d) Bodily injury, death, or damage to real or tangible property caused by Vendor's negligence or willful misconduct, in which case the aggregate direct liability will be unlimited.

G. Section 8. Vendor Responsibilities, O. Required Insurance Coverage, is hereby replaced in its entirety:

The parties do not contemplate Vendor coming on-site for any Customer work. If but only if the Vendor comes on-site, the following insurance requirements will apply.

As a condition of this Contract with DIR, Vendor shall provide the listed insurance coverage within 5 days of execution of the Contract if the Vendor is awarded services which require that Vendor's employees perform work at any Customer premises and/or use employer vehicles to conduct work on behalf of Customers. In addition, when engaged by a Customer to provide services on Customer premises, the Vendor shall, at its own expense, secure and maintain the insurance coverage specified herein, and shall provide proof of such insurance coverage to the related Customer within five (5) business days following the execution of the Purchase Order. Vendor may not begin performance under the Contract and/or a Purchase Order until such proof of insurance coverage is provided to, and approved by, DIR and the Customer. All required insurance must be issued by companies that are A+ financially rated and duly licensed, admitted, and authorized to do business in the State of Texas. The Customer and DIR will be named as Additional Insureds on all required coverage. Required coverage must remain in effect through the term of the Contract and each Purchase Order issued to Vendor there under. The minimum acceptable insurance provisions are as follows:

1) Commercial General Liability

Commercial General Liability must include a combined single limit of \$500,000 per occurrence for coverage A, B, & C including products/completed operations, where appropriate, with a separate aggregate of \$500,000. The policy shall contain the following provisions:

- a) Blanket contractual liability coverage for liability assumed under the Contract;
- b) Independent Contractor coverage;
- c) State of Texas, DIR and Customer listed as an additional insured;
- d) 30-day Notice of Termination in favor of DIR and/or Customer; and

e) Waiver of Transfer Right of Recovery Against Others in favor of DIR and/or Customer.

2) Workers' Compensation Insurance

Workers' Compensation Insurance and Employers' Liability coverage must include limits consistent with statutory benefits outlined in the Texas Workers' Compensation Act (Art. 8308-1.01 et seq. Tex. Rev. Civ. Stat) and minimum policy limits for Employers' Liability of \$250,000 bodily injury per accident, \$500,000 bodily injury disease policy limit and \$250,000 per disease per employee.

3) Business Automobile Liability Insurance

Business Automobile Liability Insurance must cover all owned, non-owned and hired vehicles with a minimum combined single limit of \$500,000 per occurrence for bodily injury and property damage. Alternative acceptable limits are \$250,000 bodily injury per person, \$500,000 bodily injury per occurrence and at least \$100,000 property damage liability per accident. The policy shall contain the following endorsements in favor of DIR and/or Customer:

- a) Waiver of Subrogation;
- b) 30-day Notice of Termination; and
- c) Additional Insured.

H. Section 9. Contract Enforcement, B. Termination, 4) Termination for Cause, is hereby replaced in its entirety:

a) Contract

Either DIR or Vendor may issue a written notice of default to the other upon the occurrence of a material breach of any covenant, warranty or provision of the Contract, upon the following preconditions: first, the parties must comply with the requirements of Chapter 2260, Texas Government Code in an attempt to resolve a dispute; second, after complying with Chapter 2260, Texas Government Code, and the dispute remains unresolved, then the non-defaulting party shall give the defaulting party thirty (30) calendar days from receipt of notice to cure said default. If the defaulting party fails to cure said default within the timeframe allowed, the non-defaulting party may, at its option and in addition to any other remedies it may have available, cancel and terminate the Contract. Customers purchasing products or services under the Contract have no power to terminate the Contract for default.

b) Purchase Order

Customer or Order Fulfiller may terminate a Schedule and related Purchase Order upon the occurrence of a material breach of any term or condition: (i) of the Contract, or (ii) included in the Purchase Order in accordance with Section 9.B.2 above, upon the following preconditions: first, the parties must comply with the requirements of Chapter 2260, Texas Government Code, in an attempt to resolve a dispute; second, after complying with Chapter 2260, Texas Government Code, and the dispute remains

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unresolved, then the non-defaulting party shall give the defaulting party thirty (30) calendar days from receipt of notice to cure said default. If the defaulting party fails to cure said default within the timeframe allowed, the non-defaulting party may, at its option and in addition to any other remedies it may have available, cancel and terminate the Schedule and related Purchase Order.

Notwithstanding the foregoing, if the breach is Customer's noncompliance with the AUP or with a law or regulation, Vendor may immediately, without liability, interrupt or suspend the Services as necessary to avoid a violation of law or regulation, to prevent a service interruption by an Internet service provider or other network services provider, or to protect the integrity of Vendor's network or the security of the Services.

I. **Section 12. Warranties**, is hereby added:

Warranties. Vendor warrants that it will use qualified personnel, and will perform the Services in accordance with the Contract and Purchase Orders/Schedules.

OTHER THAN THE EXPLICIT WARRANTIES AND THOSE WHICH CANNOT BE EXCLUDED BY APPLICABLE LAW, AND ANY WARRANTIES SPECIFICALLY PROVIDED IN AN ORDER, VENDOR PROVIDES THE SERVICES "AS IS," AND DISCLAIMS ALL WARRANTIES AND CONDITIONS, EXPRESSED, IMPLIED AND STATUTORY, INCLUDING THE WARRANTIES OF MERCHANTABILITY, SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT.

J. **Section 13. Acceptable Use Policy**, is hereby added:

Acceptable Use Policy (AUP). Customer and DIR will comply with the AUP in its use of Services and also will require its agents, contractors, customers, and employees to do so.

Any changes to the AUP will be consistent with the purpose of the AUP to encourage responsible use of Vendor's networks, systems, services, Web sites, and products. If any such change materially and adversely affects Customer's legitimate use of the Services, Customer may terminate the affected Service without incurring any liability.

K. **Section 14. Construction**, is hereby added:

Construction. The construction and interpretation of this Contract will be in accordance with its explicit language and excluding the Parties' course of dealing or to usage of trade. The Parties acknowledge that the Contract and any Order are the result of negotiation between the Parties which are represented by sophisticated counsel and therefore none of the Contract's or Order's provisions will be construed against the drafter.

L. **Section 15. Regulatory Compliance**, is hereby added:

Regulatory Compliance. Each party will comply with all laws applicable to it under this Contract and any Purchase Order/Schedule, including, but not limited to Laws related to data privacy, data protection, anti-corruption and export control.

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This Contract is executed to be effective as of the date of last signature.

Sungard Availability Services, LP

Authorized By: signature on file

Name: signature on file

Title: Chuck Kelly

Date: 2/2/15

The State of Texas, acting by and through the Department of Information Resources

Authorized By: signature on file

Name: Dale Richardson

Title: Chief Operations Officer

Date: 2/5/15

Office of General Counsel: signature on file 2/3/15